In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA AND
PHILLIPS PETROLEUM COMPANY,

Petitioners,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA;
COINOCO; UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

OPENING BRIEF FOR THE PETITIONERS

LATHAM & WATKINS
MAX L. GILLAM
MORRIS A. THURSTON
GEORGE H. WU
555 South Flower Street
Los Angeles, California
90071
(213) 485-1234

RODERICK G. DORMAN
THOMAS H. BURTON, JR.
Post Office Box 2197
Houston, Texas 77001
(713) 965-2532

Attorneys for Petitioner
Douglas Oil Company
of California

EVANS, KITCHEL & JENCKES,
P.C.
HAROLD J. BLISS, JR.
363 North First Avenue
Phoenix, Arizona 85003
(602) 262-8863

Attorneys for Petitioner
Phillips Petroleum
Company

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases

Statutes and Federal Rules

Congressional Materials

Miscellaneous

In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA AND
PHILLIPS PETROLEUM COMPANY,
Petitioners,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA;
COINOCO; UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

OPENING BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit is reported at 571 F.2d 1127 and reprinted in the Appendix at pages 1 *et seq.* The district court did not issue a memorandum opinion. The Reporter's Transcript of Proceedings before the district court appears on pages 50-65 of the Appendix and the order issued by that court is reproduced on pages 48 and 49 of the Appendix. (References to the Appendix will hereinafter be noted as "A__".)

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1978. The Petition for Writ of Certiorari was filed on April 27, 1978, and was granted on June 19, 1978. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals for the Ninth Circuit held below that it was proper for a district court having jurisdiction over grand jury transcripts in the possession of the government to rule that private, civil plaintiffs demonstrated a sufficient compelling need for those transcripts and were entitled to inspect and copy them where: (a) the civil actions, for which the transcripts were sought, were pending in a foreign district court; (b) the defendants in those civil actions had copies of all of the transcripts sought by the plaintiffs; (c) the district judge ordering disclosure was not familiar with either the earlier grand jury proceedings or the pending civil actions; and (d) the district judge did not require a definite showing of relevancy of the transcripts to the subject matter of the civil actions. The questions presented are:

1. Whether the plaintiffs in a civil action have made the required particularized showing of compelling necessity for disclosure of entire grand jury transcripts merely by showing that several defendants pleaded *nolo contendere* to an antitrust indictment returned over one year after the civil action was filed when the conspiracy alleged in the indictment is not the same conspiracy as that alleged in the civil action and where the matters considered by the grand jury are not shown to be relevant to the civil action.

2. Whether the district court in which the civil action is pending — the court familiar with the lawsuit and charged with responsibility for its administration — is the proper court to determine issues of relevancy and "particularized need" when secret grand jury transcripts are sought, rather than the judge of a foreign district court who is unfamiliar with both the civil action for which the transcripts are sought and the criminal action which was brought as a result of the grand jury proceedings.

STATUTE INVOLVED

Rule 6(e), Federal Rules of Criminal Procedure:

Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any jurors may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.[1]

---

[1] Both the Petition for Writ of Certiorari and Respondent's Brief in Opposition to the Petition inaccurately cited the latest revision of Rule 6(e) as the "Statute Involved" in this case. Rule 6(e) was amended by order of this Court on April 26, 1976, and Congress modified and adopted the amendment in the following year. The amendment did not become effective until October 1, 1977. *See* note 33, *infra*. The civil plaintiffs filed their "Petition for Production for Inspection of Transcripts of Grand Jury Testimony and Documents Produced Pursuant to the Grand Jury Subpoena" on December 15, 1976, prior to the effective date of the amendment. (A. iii) Although the prior version of the rule is to be construed, the meaning of the relevant part of the revised Rule 6(e) was not changed. *See* 123 Cong. Rec. H7867 (daily ed. July 27, 1977) (remarks of Rep. Mann).

STATEMENT OF THE CASE

In 1973, two separate antitrust actions were filed in the United States District Court, District of Arizona — one by respondent Petrol Stops Northwest[2] and the other by respondents Gas-A-Tron of Arizona and Coinoco[3] — against a number of gasoline refiners and wholesalers.[4] (A. 129-147, 148-167) Phillips Petroleum Company ("Phillips") was named as a defendant in both lawsuits and Douglas Oil Company of California ("Douglas") was named only in the former action.[5]

On March 17, 1975, *over one year after* the Arizona civil complaints were filed, a grand jury indictment was returned in the United States District Court, Central District of California, charging Phillips, Douglas and four other corporate defendants with a conspiracy to fix

---

[2] *Petrol Stops Northwest v. Continental Oil Company, Douglas Oil Company, Gulf Oil Company, Shell Oil Company, Exxon Corporation, Mobil Oil Corporation, Union Oil Company of California, Amoco Oil Company, Standard Oil Company of California, Standard Oil Company of Indiana, Phillips Petroleum Company, and Armour Oil Company,* Civil No. 73-212-TUC-JAW (D. Ariz.).

[3] *Gas-A-Tron of Arizona and Coinoco v. Union Oil of California, Amoco Oil Company, Standard Oil Company of Indiana, Shell Oil Company, Mobil Oil Corporation, Standard Oil Company of California, Phillips Petroleum Company, Exxon Corporation, and Diamond Shamrock,* Civil No. 73-191-TUC-WCF (D. Ariz.).

[4] For convenience respondents Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco will hereinafter be referred to collectively as "Petrol Stops". Respondents were related partnerships engaged in the retail distribution of gasoline at service stations owned, leased or operated by respondents individually or in conjunction with others. Petrol Stops Northwest had stations in eight states in the West and Midwest; Gas-A-Tron of Arizona and Coinoco operated primarily in Tucson, Arizona. (A. 130 and 149)

[5] The United States District Court, District of Arizona, will hereinafter be referred to as the "Arizona court" and the civil suits filed by Petrol Stops will hereinafter be referred to as the "Arizona actions".

the price of "rebrand gasoline".[6] (A. 118-122) *None* of the defendants named in the grand jury indictment, other than Douglas and Phillips, were involved in either Arizona action. *None* of the refiners and wholesalers named in the Arizona actions, except Douglas and Phillips, were named in the indictment.[7]

In October of 1976, pursuant to Rule 34 of the Federal Rules of Civil Procedure, Petrol Stops filed and served in the Arizona actions a request for production of all of the grand jury documents and transcripts in the possession of Douglas and Phillips.[8] Douglas and Phillips objected to the production of those items on relevancy and related grounds. Rather than move for an order compelling discovery in the Arizona court, Petrol Stops instead went to California and filed a petition for production of the grand jury material in the United States District Court, Central District of California, a court wholly unfamiliar with the underlying civil actions.[9] (A. 114-117) The petition sought the disclosure of the same documents and transcripts which had been the subject of Petrol Stops' Rule 34 request in the Arizona actions; copies of those grand jury materials were also

---

[6] The indictment defined "rebrand gasoline" as "gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner". (A. 118) The defendants in the indictment included Douglas, Phillips, MacMillan Ring-Free Oil Company, Powerine Oil Company, Golden Eagle Refining Company and Fletcher Oil & Refining Company. (A. 118-120)

[7] In addition to the indictment, a civil complaint was filed simultaneously by the government against the six defendants named in the indictment. (A. 123) The indictment resulted in the entry of a plea of *nolo contendere* by each defendant, and the civil complaint resulted in the entry of a consent judgment against each defendant.

[8] Douglas and Phillips have in their possession all documents produced by them to the grand jury and all transcripts of testimony of their employees and former employees before the grand jury.

[9] The United States District Court, Central District of California will hereinafter be referred to as the "California court".

in the possession of the Antitrust Division of the United States Department of Justice in Los Angeles ("Antitrust Division").

The Antitrust Division did not object to the disclosure, but suggested that Douglas and Phillips be afforded the right to be heard. (A. 99-100) Douglas and Phillips appeared as real parties in interest and opposed the petition, arguing that Phillips and Douglas had copies of the documents and transcripts sought by Petrol Stops, that Petrol Stops had not made a sufficient showing of particularized need to warrant disclosure of secret grand jury transcripts, that the Arizona court was the proper court to determine relevancy and need, and that Petrol Stops ought not to be permitted to "forum shop". (A. 90-98) In support of its petition, Petrol Stops made a single offering to demonstrate its "particularized need" for the production of the grand jury materials, namely that Douglas and Phillips had stated in response to one of Petrol Stops' interrogatories that they were unaware of any conversations or communications with their competitors regarding the wholesale price of gasoline sold to unbranded (independent) marketers in the western states. (A. 103-104) Although the indictment involved a different group of defendants and was not shown to involve the same sphere of business as the Arizona lawsuits, Petrol Stops nevertheless argued that since Douglas and Phillips had pleaded *nolo contendere* in the criminal action, all transcripts and documents generated and produced before the grand jury would be useful in assisting discovery and in impeaching that single interrogatory response.

At the hearing on the petition, the district judge admitted that he had not been involved with the grand jury proceeding[10] and that he had "no information about the

[10] Judge Malcolm Lucas presided over the criminal proceedings. Judge Harry Pregerson presided over the civil proceedings brought by the government. Judge William P. Gray heard Petrol Stops' Petition for Production.

considerations of problems that the grand jury had when they considered this matter . . . ." (A. 53) In his comments, the district judge indicated that he had no firm foundation for a belief that the requested grand jury material would be relevant to the Arizona lawsuits, and added that he did not think that relevancy was even important to the question of disclosure involved. (A. 57)

The district judge entered an order granting Petrol Stops' production request with certain limitations on use of the materials. (A. 48-49) Douglas and Phillips sought and obtained a stay of the order pending appeal to the Court of Appeals for the Ninth Circuit. On March 20, 1978, the court of appeals affirmed the order of the district court finding that Petrol Stops had demonstrated a particularized need by showing that "some of the answers Douglas and Phillips made to its interrogatories might contradict the charges in the indictment."[11] (A. 7) A stay of mandate of the decision of the court of appeals was obtained pending application for writ of certiorari from this Court. The Arizona actions are still pending.

SUMMARY OF ARGUMENT

If the policy of grand jury secrecy is to retain any vitality, the standard established by this Court to regulate the disclosure of grand jury matters to civil

[11] On October 31, 1977, Petrol Stops had moved to supplement the appellate record with two affidavits and unfinished and unsigned deposition testimony from its civil case that purportedly showed additional need. (A. 22-47) None of those materials had been presented to the district court when it ruled upon the Petrol Stops petition. The court of appeals (per Judge Hufstedler) denied the motion on Dec. 5, 1977, but added that "... the materials in issue may be lodged with the Court for such use as the panel which determines this appeal on its merits deems proper." (A. 9) Thus, materials that were *never* before the district court nevertheless found their way into the appellate opinion. "On appeal Petrol Stops make a stronger showing, pointing out inconsistencies between the government's bill of particulars and statements made in recent depositions." (A. 7) The bill of particulars was likewise never before the district court or included in Petrol Stops' motion to supplement but merely quoted in part, without prior notice or approval of any court, in their appellate brief.

litigants must be observed and procedures must exist to insure that that standard is observed. In *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), this Court enunciated the standard against which all subsequent requests by civil litigants for grand jury materials have been measured, *i.e.*, that the " 'indispensable secrecy of grand jury proceedings' . . . must not be broken except where there is a compelling necessity. There are instances when that need will outweigh countervailing policy. But they must be shown with particularity." *Id.* at 682. The secrecy of grand jury proceedings must always prevail in the absence of a particular, compelling need. This standard was predicated on sound reasoning which today is no less compelling than it was twenty years ago. However, some lower courts have failed to follow this Court's pronouncement and the standard of compelling necessity has been largely eroded. The decision of the Ninth Circuit Court of Appeals below represents the most radical departure from that standard to date. The district court was held not to have abused its discretion in ordering production of entire grand jury transcripts even though it: (1) did not require a showing of particularized need as mandated by this Court in *Procter & Gamble*, (2) erroneously held that no important reasons for the continued secrecy of the grand jury transcripts would exist once the criminal proceeding had ended and the defendants therein had obtained copies of the grand jury materials, and (3) ordered the wholesale production of grand jury materials without ever determining whether any portion of those materials would be relevant either specifically for purposes of impeachment or generally to the Arizona actions.

Both the district court and the court of appeals below have erred in holding that little or no need is required for disclosure once the criminal case has been concluded. To the contrary, substantial reasons for the continued

secrecy of the materials exist, especially in the context of an antitrust grand jury investigation. The policy and practical reasons for continued secrecy are simply too important to ignore, as the courts did below.

The failure of the district court to apply properly the "compelling necessity" standard resulted in large part from its inability to do so. That task requires a court to weigh two independent determinations. A court must first identify the reasons which require the continued secrecy of the grand jury testimony and then must determine the specific need of the civil litigant for that testimony. Once done, that court must weigh those two competing interests to determine whether disclosure is warranted.

In the instant case, a judge unfamiliar with both the grand jury proceedings and the civil actions for which the materials were sought was called upon to weigh those competing interests. In situations such as this, where grand jury testimony is sought for a civil action in a district court other than the one in which the grand jury sat, a procedure must be observed whereby the court having the information required for a determination of compelling necessity participates in that decision.

The court in which the civil suit is pending is generally the court best able to resolve all the preliminary issues required for a determination that a compelling necessity exists which warrants disclosure of grand jury testimony. Only that court can be expected to answer the questions which must be addressed to determine whether there is a legitimate, particularized need for the testimony. Are the materials sought relevant to the subject matter of the civil action? Is the information sought necessary to any claim or defense of the party seeking disclosure in the civil action? Can the needed testimony be obtained elsewhere through other civil discovery means? Is it appropriate to order production of such material at *this* stage of civil litigation? Similarly, that court will be as well

equipped as any other to identify and evaluate the reasons for continued grand jury secrecy once the criminal proceedings have been concluded. That latter determination largely involves general issues of policy rather than specific facts. The court in which the civil suit is pending is, therefore, the court best suited to decide whether the disclosure of grand jury testimony is actually warranted.

A number of procedures were available to the district court below, any of which would have properly placed the determination of compelling necessity before the court in which the civil suits are pending. The California court could have denied Petrol Stops' petition and instructed them to seek a discovery ruling compelling production from the court in which their cases were pending. Alternatively, the California court could have initially determined the extent of the need for continued secrecy and, if the need was less than absolute, could have made the grand jury transcripts in the possession of the government available to the Arizona court in order for that court to determine whether, in either of the lawsuits before it, a compelling need for disclosure existed. Instead, the district court judge, who admittedly was unfamiliar with both the grand jury proceeding and the underlying civil actions for which the testimony was sought, refused to adopt available and suggested procedures which would have insured that the court best able to decide the issue of particularized need would be the one to make that determination.[12]

---

[12] Douglas proposed to the California court, in its Memorandum in Opposition to Petrol Stops' Petition for Production (A. 90-95), a procedure which would have permitted the Arizona court to determine the issues of relevancy and particularized need. An erroneous statement in the opinion of the Ninth Circuit below might lead one to believe that those issues had been presented to the Arizona court, but that the Arizona court had declined to rule on them. "The district court for the District of Arizona apparently hesitated to grant discovery of these materials because of its inability to evaluate the need for continued secrecy." *Petrol Stops Northwest v. United States*, 571 F.2d 1127, 1130, n.4 (9th Cir. 1978). (A. 7) That statement is simply incorrect and is not supported by the record; for while Petrol Stops requested the grand jury material from Douglas and Phillips under Rule 34, Federal Rules of Civil Procedure, it did not file a motion under Rule 37, Federal Rules of Civil Procedure, to compel production. The Arizona court, therefore, had not been called upon to decide the issue.

ARGUMENT

I

A CIVIL LITIGANT MUST DEMONSTRATE A COMPELLING NECESSITY FOR SPECIFIC GRAND JURY MATERIALS BEFORE DISCLOSURE IS PROPER

A. Substantial Reasons Which Require That Grand Jury Materials Not Be Disclosed Continue To Exist After The Criminal Proceedings Have Ended

The grand jury as a public institution serving the community might suffer if those testifying today know that the secrecy of their testimony would be lifted tomorrow. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

The concern expressed by Mr. Justice Douglas for this Court was properly founded on the fact that testimony before a grand jury will neither be as candid nor as extensive if a witness knows that his testimony will not remain secret.[13] This concern has special applicability to antitrust investigations.

The ability of a grand jury to ferret out antitrust violations must necessarily suffer where those testifying know that their testimony will not be kept secret. A witness who is questioned about the business practices of himself and others will fear some form of retaliation and will be discouraged from testifying fully. In an antitrust investigation this fear of retaliation relates not only to the witness' own employer, but also to other companies

---

[13] In addition to encouraging open and frank disclosures by grand jury witnesses, four other reasons have traditionally been ad-

in the same industry whose activities he has called into question.[14] An antitrust investigation normally examines the business practices of many firms in an industry. A witness before a grand jury is questioned as to his conduct, that of fellow employees, and the conduct of other firms and their employees. In many cases he will be called upon to testify about customers, suppliers, and other individuals and firms with whom he deals in arms length, business transactions. These are the very people upon whom his business and his opportunities for advancement depend. Additionally, these are the people who represent the only alternative employers to a witness who has long worked in a single industry. One cannot expect a grand jury witness who knows his testimony will not remain secret to testify as fully as one who is assured of its secrecy. Facts that might be recalled may never be developed. Leads that might be suggested may never come to light.

---

vanced to justify grand jury secrecy. As summarized in *United States v. Rose*, 215 F.2d 617, 628-629 (3rd Cir. 1954), and cited by this court in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958), the five reasons are:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

[14] Traditionally, the fear of retaliation has focused only upon action by the witness' employer. This view fails to account for both the manner in which grand juries function and the realities of a business environment. Possible retaliation is not and never has been confined to the corporate employer, nor is it perceived by a witness to be confined to the employer. Retaliation by other members of the business community in which the witness must work is often more pernicious.

Where a civil litigant seeks disclosure of grand jury testimony, the policy concern of encouraging the unfettered flow of information to the grand jury is not the only existing reason for grand jury secrecy. Whenever a courts orders the production of the *entire text* of a grand jury transcript to a civil litigant, another traditional reason for grand jury secrecy is endangered — the need to protect the innocent accused from disclosure of the fact that he was under investigation. The transcript of a grand jury witness will inevitably contain information about individuals and firms other than himself and his employer. In a grand jury investigation, the rules of evidence are suspended; a witness may be asked to testify as to hearsay, suspicion, and his personal deductions and opinions without regard to the probative value of his testimony in a later trial. The witness may reveal information and opinions about individuals and firms that are never indicted. Additionally, the content of answers by other, earlier witnesses about firms and individuals not later indicted can be expected to surface in questions asked of this witness by the prosecuting attorney. When the entire text of a grand jury transcript is disclosed to a civil litigant, the names of innocent individuals and all the acts they may have been suspected of, but which the evidence was not sufficient to indict them for, are disclosed.

This is particularly true of grand juries which are investigating possible antitrust violations. This type of grand jury, unlike many other types of federal grand juries, generally investigates in a broad, wide-reaching manner. Evidence will be received that could relate to many possible violations of the antitrust laws. When a narrow indictment issues, such as the rebrand gasoline indictment involved in this case, wholesale production of grand jury materials reveals all of the alleged improper activities and the individuals suspected of participating in those activities, even though there was insuf-

ficient evidence to justify an indictment on any of those activities. This policy of protecting the innocent by maintaining the secrecy of grand jury materials applies to all of those persons or acts as to which the grand jury found no probable cause to believe that a crime had been committed. Thus, the policy of protecting the "innocent accused" continues to exist well after any specific narrow indictment has been brought.

The protection which fairness requires be accorded to the innocent accused also extends to individuals and firms who are indicted. Where a grand jury conducts a broad investigation into many areas, the acts which indicted individuals were suspected of doing, but for which they were not indicted, should remain undisclosed. Indicted individuals remain "innocent accused" with regard to all matters for which there was no evidence or finding of wrongdoing. The publication of the entire text of grand jury transcripts results in the disclosure of all the acts these parties were merely suspected of doing.

The disclosure of entire texts of grand jury transcripts may have the additional, unfortunate result of impinging upon the activities of grand jurors themselves.[15] Grand jurors often take a very active part in the proceedings; they ask questions, make comments, are allowed to share their own experiences and backgrounds, and are not burdened by strict evidentiary rules in their questions and deliberations. A grand juror who knows that the "sanctuary" of the grand jury may not remain sacrosanct and that the extent and substance of his participation may become widely known may not participate as fully as he would otherwise. As noted by this Court in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959):

[15] The second of the five policy reasons historically advanced in support of the need for grand jury secrecy is the need to insure the utmost freedom to the grand jury in its deliberations. *See* note 13, *supra*.

> [Grand jury] indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves. . . . To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused. Especially is this true in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness. *Id.* at 400.

All these reasons require that grand jury materials remain secret even after all criminal proceedings have ended. But petitioners do not contend that in all cases requests for grand jury materials should be denied. Other policy reasons require that the shroud of secrecy not remain absolute, but be discretely lifted. Civil litigants aid the government in the enforcement of the antitrust laws; disclosure of grand jury materials to civil litigants in select situations might aid that enforcement function. What then is the "right" amount of disclosure of grand jury materials after the criminal proceedings have ended? How does one fashion a rule which adequately protects the grand jury process and individuals affected by that process and concomitantly aids civil litigants?

B. The Standard Established By This Court Permits Selective Disclosure Of Grand Jury Materials Only After A Showing Of "Compelling Necessity"

The single rule which promotes and protects the public interests affected whenever grand jury materials are sought by a civil litigant was articulated by this Court in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). This Court properly held that a civil litigant must demonstrate a compelling necessity for specified grand jury materials before disclosure is proper. A compelling necessity could only exist where the demonstrated "particularized need" of the civil litigant outweighed the reasons for the continued secrecy of the materials sought. By requiring that a need be shown for *specific* testimony, this Court insured that the identity of unindicted parties and unsupported allegations would not be disclosed unnecessarily; by requiring that a party seeking disclosure demonstrate that the information sought could not be attained through other means, this Court insured that the secrecy of grand jury proceedings which encourages individuals to testify freely and openly before it would not be breached needlessly; and by permitting a party seeking disclosure to gain access to specific grand jury materials if the materials were necessary to his claim, this Court protected the legitimate needs of civil litigants. This Court's decision in *Procter & Gamble* provided the only standard of disclosure which could adequately protect all competing public and private interests when grand jury materials are sought.

In *Procter & Gamble*, the criminal proceedings had terminated without an indictment and the government had filed a civil antitrust suit against the defendants. The government was using the grand jury transcripts to prepare for the civil case and the defendants in that suit sought to do the same. In *United States v. Procter & Gamble Co.*, 19 F.R.D. 122 (D.N.J. 1956), the district

court granted the motion seeking discovery, ruling that defendants had shown "good cause" as then required by Rule 34. The good cause showing rested on the ground that the government was using the transcript in preparation for trial, that it would be useful to the defendants in their preparation for trial, and that only in this way could the defendants get the desired information. These reasons, the district court concluded, outweighed the reasons behind the policy for maintaining the secrecy of the grand jury proceedings. *Id.* at 128. The district court entered an order directing the government to produce all the transcripts and to permit defendants to inspect and copy them. As the government persisted in its refusal to disclose the grand jury transcripts, the district court entered judgment of dismissal and the government appealed.

In reversing the district court's order requiring disclosure of the grand jury transcripts, this Court prescribed guidelines for trial judges to follow when ruling on requests for the production of secret grand jury materials.

This "indispensable secrecy of grand jury proceedings," *United States v. Johnson, supra,* (319 U.S. at 513), must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity.

No such showing was made here. The relevancy and usefulness of the testimony sought were, of course, sufficiently established. If the grand jury transcript were made available, discovery through depositions, which might involve delay and substantial costs, would be avoided. Yet these showings fall short of proof that without the transcript a defense would be greatly prejudiced or that without reference to it an injustice

would be done. *United States v. Procter & Gamble Co., supra,* 356 U.S. at 682.

This Court thereby articulated a balancing test for the determination of whether to disclose grand jury materials, that test required that the "particularized need" for disclosure be weighed against the existing reasons for grand jury secrecy. A mere showing that materials were needed to avoid the delay and expense of procuring the same information through civil discovery techniques was expressly rejected as being insufficient to constitute a showing of compelling necessity. Much more was required. This Court prescribed the constituent elements necessary to any showing of "particularized need". As a minimum showing of particularized need, a trial judge must require:

1. That the relevancy and usefulness of the testimony be sufficiently established; and

2. That *proof* be required that without the transcript a defense would be greatly prejudiced, or without reference to it an injustice would be done. *Id.* at 682.

This Court went on to explain its requirement for particularity and the confining of disclosure to the limits of the need shown:

> We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, or to test his credibility, and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discreetly and limitedly. We only hold that no compelling necessity has been shown for the *wholesale* discovery and production of a grand jury transcript under Rule 34. We hold that a much more particularized, more discreet showing of need is necessary to establish "good cause." *The court made no such particularized finding of need in case of any one witness.* *Id.* at 683. (Emphasis in last sentence added.)

Therefore, an essential requirement is that the need shown by the seeking party must in fact be *particularized, e.g.,* that a need exists for specific grand jury testimony to impeach a specific witness' credibility or the like. Where such specific requests for identified uses and purposes have not been made, a particularized need sufficient to outweigh the continued reasons for grand jury secrecy cannot exist and there can be no compelling necessity for the production of secret grand jury testimony.

C. The "Slight Need" Standard Utilized By The Lower Courts Herein Is Contrary To The "Compelling Necessity" Standard Established By This Court

The court of appeals in upholding the district court's discovery order below utilized a "slight need" standard, which does not require that the seeking party make a showing of *compelling* necessity. As stated in the court of appeal's opinion: "The district court recognized that some particularized need was necessary but that it did not have to be great." *Petrol Stops Northwest v. United States,* 571 F.2d 1127, 1131 (9th Cir. 1978). In this case, the Ninth Circuit required little more than a showing that the material sought might be useful. The erroneous standard utilized by the Ninth Circuit is in direct conflict with this Court's standard in *Procter & Gamble,* principally because it lacks a threshold level of necessity for the release of grand jury materials. Thus, the secrecy of grand jury proceedings was permitted to be broken not after a showing of a "compelling necessity" (this Court's standard) but rather where the particularized need was not shown to be significant or urgent.

The circuit courts which have considered the issue of the appropriate standard to be applied have reached

conflicting results. On the one hand, the Fifth Circuit has followed this Court's pronouncement, stating that a primary reason for grand jury secrecy is "to create a sanctuary, inviolate to *any* intrusion except on proof of some special and overriding need . . . [footnote omitted.]" *State of Texas v. United States Steel Corp.*, 546 F.2d 626, 629 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977). In that case, corporate defendants in a civil antitrust suit filed an interlocutory appeal from the trial court's order to surrender grand jury transcripts which each defendant had previously obtained pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure. The defendants had subsequently pleaded *nolo contendere* to the indictment and the same alleged conduct formed the basis of both the criminal case and the state's civil case. The Fifth Circuit rejected the state's argument that the facts of the case dispelled any reason for continued secrecy and that it should not be obligated to demonstrate particularized need. Instead, the Fifth Circuit adhered to the strict standard of *Procter & Gamble* and held that disclosure of grand jury transcripts could not be proper without an affirmative showing of compelling necessity. *Cf., Baker v. United States Steel Corp.*, 492 F.2d 1074, 1079 (2nd Cir. 1974) (where the Second Circuit indicated its disapproval of a standard of "slight need" in this context). Conversely, both the Ninth Circuit, in the present case, and the Seventh Circuit, in *State of Illinois v. Sarbaugh*, 552 F.2d 768, 775-777 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co. v. Illinois*, 434 U.S. 889 (1977), have permitted access to grand jury transcripts on a showing of need which was admitted to be less than a "compelling necessity".

This Court has always required disclosures of secret grand jury materials to be justified by a specific positive demonstration of compelling need. *E.g., Dennis v. United States*, 384 U.S. 855 (1966); *Pittsburgh Plate Glass*

Company v. United States, 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). The "slight need" standard which fails to afford sufficient weight to the "indispensable secrecy of grand jury proceedings" is clearly contrary to this Court's previous decisions.

II

THE DISTRICT COURT BELOW ABUSED ITS DISCRETION BY IMPROPERLY DIRECTING THAT GRAND JURY TRANSCRIPTS BE RELEASED TO THE RESPONDENTS

A. The District Court Did Not Require A Minimum Showing Of Particularized Need As Required By This Court

The district court in the instant case did not require Petrol Stops to make any showing of particularized need in order to satisfy the "compelling necessity" standard of *Procter & Gamble*. No showing was made that the testimony sought was relevant and no proof was offered that without the testimony Petrol Stops would be greatly prejudiced. To the extent there was any attempt to show a need for the transcripts, the need was generalized, not particularized.

The district court never required or solicited a sufficient showing of relevance. The district court was advised by counsel for Douglas and Phillips: (1) that the scope of discovery was to be a hotly-contested issue in the district court in Arizona, (2) that the Arizona District Court, which had a greater familiarity with the cases, had yet to rule on the scope of discovery in the lawsuits before it, and (3) that the participation of the Arizona court was necessary for a proper resolution of the issue. An excerpt from the transcript of the hearing before the district court judge is indicative of the failure of that court to

sufficiently establish the relevancy of the requested documents:

> MR. THURSTON (counsel for Douglas): Your Honor, I think the question here is whether or not the materials sought by these plaintiffs are relevant to the lawsuit that they have brought. Judges Walsh and Frey ought to be able to make that decision.
>
> THE COURT: The petitioners seem to think it is relevant. Apparently it involves an allegation of antitrust violation by Douglas and Phillips, and apparently that is what the grand jury proceeding involved. Apparently employees of Douglas and Phillips testified. They may be the same employees that will be expected to testify again. *I don't know. But suppose it isn't relevant? If there is no harm in going through the list of reasons of the sanctity of the grand jury proceedings, if there is no harm in its being divulged, why are we worried particularly about whether or not it is relevant?* (Emphasis added.) Reporter's Transcript of Proceedings of March 28, 1977. (A. 56-57)

(One answer to the district court's inquiry is that this Court in *Procter & Gamble* required that the relevancy and usefulness of the testimony be sufficiently established prior to any release of secret grand jury materials.)

At the hearing before the district court, Douglas and Phillips argued that the requested grand jury materials were not even relevant to Petrol Stops' lawsuit. The district judge apparently satisfied himself that they were relevant merely by asking *counsel for Petrol Stops* whether he believed they were.[16] This approach is

[16] At the hearing on their Petition for Production, Petrol Stops represented to the district court: "Your Honor, the complaint and indictment contain absolutely identical and parallel allegations with regard to prices on the sale of gasoline through and to independent marketers." (A. 58) However, the indictment, in three charging paragraphs, charged a conspiracy to fix, stabilize and maintain the price of "rebrand gasoline". (A. 121) *None* of the fifty-six charging paragraphs in the two civil complaints mentions rebrand gasoline", (A. 129-167) and the defendants in the civil actions are different from those pleading *nolo contendere* to the government case except for Douglas and Phillips.

especially egregious because the district court judge had already expressed his unfamiliarity with both the grand jury proceedings and the civil actions in Arizona. (A. 55-57) The establishment of particularized need as required by this Court is not met merely by ascertaining that the party seeking disclosure *believes* that the information may be relevant. (A. 58-59) This is particularly true here where the district court was aware that the civil actions did not follow the government's case and differed from the latter both as to parties and subject matter. (A. 58-60) Because this Court has mandated that a "particularized finding of need" must precede the release of grand jury transcripts, it is beyond the permissible discretion of the district court to order the production of the transcripts without sufficient scrutiny of the very facts in the case which will demonstrate the existence or non-existence of particularized need.

The district court judge based his decision on relevance simply on the fact that the civil suits in Arizona and the grand jury proceeding in Los Angeles both concerned alleged antitrust improprieties. The word "antitrust" is the skin for many different thoughts and a multitude of potential sins. Something more than reference to the fact that Petrol Stops' lawsuits are "antitrust" actions and that the indictment returned against the six corporate defendants concerned "antitrust" violations is necessary for a showing of relevance. If the subject matter of this lawsuit was an alleged attempt by an oil company to force a service station dealer to buy company sponsored tires, batteries and accessories, a grand jury inquiry into whether various corporate defendants concertedly re-

stricted the supply of crude oil into the United States would hardly be relevant to that lawsuit. Yet, the standard applied by the district court in this action would hold that it would be, and thus flouts the teaching of *Procter & Gamble* and eliminates "relevance" as a condition for disclosure.

Additionally, the district court in the instant case did not require from Petrol Stops any proof or substantial showing that without the transcripts Petrol Stops would be greatly prejudiced or that an injustice would be done. At the time of the filing of the petition before the California court, Petrol Stops had not bothered to view any documents Douglas or Phillips had offered to produce, nor had Petrol Stops deposed any employees or ex-employees of these two defendants. (A. 62-63) By not even making a modest inquiry into whether or not Petrol Stops could acquire the information it sought without breaching the sanctity of the grand jury, the district court judge failed to require a showing of particularized need as mandated by this Court.

Finally, the district court failed to require that the need shown be sufficiently particularized. This Court in *Procter & Gamble* contemplated that any disclosure of grand jury testimony would only be made following a showing of a specific and immediate use for the requested material, *e.g.*, for the purpose of impeaching or aiding the recollection of an identified witness or witnesses. The need demonstrated has to be particular and not general. The purported "particularized need" offered by Petrol Stops in this case was simply that all the transcripts might be useful to impeach a single interrogatory answer.[17] Given the extremely broad nature of that inter-

[17] Petrol Stops, in their original memorandum which accompanied their petition before the district court, asserted a "need" for grand jury documents which rested on alleged factual inaccuracies in interrogatory responses by Douglas and Phillips.

rogatory, the "particularized need" of Petrol Stops for the grand jury transcripts was really the need to find some evidence to suggest that the defendants in their lawsuits are guilty and not innocent. No more general need could be imagined. No particularized showing was offered, nor could there be any, since Petrol Stops could not impeach the testimony in their lawsuits of a Douglas or Phillips employee until Petrol Stops first deposed an employee or ex-employee of one of those companies.[18]

Petrol Stops' argument ran as follows: In February of 1974 (over a year before the indictment was returned), Petrol Stops propounded interrogatories in which defendants were asked to state whether they had had any conversation or communication with their competitors regarding the wholesale price of gasoline sold to unbranded (independent) marketers in the western states. Both Phillips and Douglas responded to the above interrogatory stating that they were unaware of any such conversations or communications. Petrol Stops then noted in their papers that Phillips and Douglas were indicted on federal charges of conspiring to "increase, fix, stabilize and maintain the price of rebrand gasoline" in five western states from 1970 through 1971 and that both Phillips and Douglas "entered *guilty* pleas to the charges of conspiracy and price-fixing contained in the indictment." (Emphasis added.) (A. 104) Therefore, concluded Petrol Stops, both Phillips and Douglas must have perjured themselves in their interrogatory answers. However, neither Douglas nor Phillips have ever pleaded guilty to such charges and the logic of Petrol Stops' syllogism is therefore faulty. Sometimes after all the other indicted companies had pleaded *nolo contendere* to the charges against them, Phillips and Douglas decided, with the court's approval, to change their pleas to *nolo contendere*. This plea is not the equivalent of a plea of guilty, and is certainly not for the purpose of demonstrating general "perjury".

[18] The inability of Petrol Stops to demonstrate to the district court a particularized need for testimony and to prove that without the transcripts it would be greatly prejudiced is well illustrated by their desperate attempt to place before the appellate court matters never before the district court and wholly extraneous to the appeal. In a motion to supplement the record, Petrol Stops sought to include certain unfinished and unsigned deposition testimony of Douglas employees and ex-employees which had been taken *after* the district court's ruling and two statements by a former member of the Department of Justice. (A. 22 *et seq.*) Petrol Stops' motion to supplement the

Concomitantly, the district court erred in ordering the production of the *entire* transcripts. This Court in *Procter & Gamble* characterized the cases where particularized need had been shown as being those "[w]here the secrecy of [grand jury] proceedings is lifted *discretely and limitedly* [emphasis added]." 356 U.S. at 683. Assuming *arguendo* that some particularized need was demonstrated, the district court would still only be permitted to order disclosure of those portions of the transcript which clearly pertain to the need shown by the seeking party. Here, consistent with the district court's initial failure to carefully scrutinize Petrol Stops' showing of need or to consider the issue of relevance of the materials to the civil actions, the court further erred by ordering the wholesale production of the grand jury transcripts.

B. The District Court Erroneously Held That No Need For Grand Jury Secrecy Existed In This Case

The district court judge repeated the test of Mr. Justice Douglas in *Procter & Gamble*, and listed the five policy reasons underlying the grand jury secrecy rule. (A. 53-54) He then discussed how the fourth policy reason, *i.e.* to encourage disclosure of information to the grand jury,

---

record with these irrelevant materials was properly denied by the court of appeals. (A. 9) *See* note 11, *supra*.

In designating portions of the record to be included in the Appendix filed with this Court, Petrol Stops has persisted in their attempt to use these extraneous materials. Petrol Stops has insisted that their motion to supplement the record (which motion was denied), including the documents which were the subject of and attached to that motion, be included as a part of the Appendix. The result is that materials which were not a part of the record before the district court or initially before the appellate court are now contained in this Court's Appendix. These materials should have no effect on this Court's decision. Petrol Stops' persistence in having them included in the record merely underscores the weakness of their showing of particularized need before the district court.

was pertinent, but that in this instance it was no longer a concern.

> So the fourth [policy reason] is the only one that has pertinence, but the defendants in this case have all the information . . . So if Douglas and Phillips have the information, then the need to withdraw it for the fourth purpose seems to me to disappear.
>
> And when you get right down to it, this is a civil antitrust action. . . . Douglas and Phillips have that information; I can't see any valid reason why the petitioners should not have it also. (A. 54-55)

In *Procter & Gamble*, it was held that, although the grand jury transcripts were being utilized by the government in preparation for its civil antitrust case, the defendants in the suit would not be afforded the same privilege without a demonstration of particularized and compelling need. This Court rejected defendants' argument that only by means of the grand jury transcripts could the defendants get the information.

Although the possession by Douglas and Phillips of the grand jury transcripts might arguably reduce the concern that disclosure would impair the future flow of information to the grand jury, it cannot eliminate it. The chilling effect of all other possible forms of retaliation continues to be an important concern. The court below was charged with protecting this concern, but it failed to do so.

Finally, not only did the court below fail to protect the fourth concern for grand jury secrecy, but the unwarranted action it took succeeded in endangering other policy concerns. By ordering disclosure of entire transcripts, the court below failed to protect the innocent accused who is exonerated from disclosure of the fact that he had been under investigation. *See* pages 13-14, *supra*. By ordering disclosure of entire transcripts, the

court below failed to insure the utmost freedom of future grand juries in their deliberations. *See* pages 14-15, *supra*. The failure both to require a particularized need and thereafter to order a limited disclosure endangered the three historical reasons advanced in support of the policy for grand jury secrecy.

III

THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO FOLLOW AVAILABLE PROCEDURES TO INSURE THAT THE DETERMINATION OF COMPELLING NEED FOR GRAND JURY TRANSCRIPT DISCLOSURE BE MADE BY THE COURT BEST ABLE TO MAKE THAT DETERMINATION

The district court below did not carry out this Court's mandate largely because it could not; it was neither apprised of the needs of the civil litigants nor of the facts of the criminal proceeding. In situations such as this where a civil action is filed in a court other than the one in which the grand jury sat, a procedure must be observed that insures that the court having the most complete information and being the most competent to determine the issues before it is in fact the one which will make the determination of particularized need and compelling necessity.

A. The Question of Whether A Civil Litigant Has Shown A Sufficient Particularized Need For Grand Jury Transcripts Is Best Determined By The Court In Which The Civil Suit Is Pending

A district court must be well informed about the factual and legal issues in a civil case before it can competently rule on whether a civil litigant has a particularized need for the grand jury materials he seeks. Where the civil case is a complex antitrust action, the task of

becoming sufficiently informed about the lawsuit can be formidable. Before a court can determine the relevance of materials sought, it must understand the subject matter of the pending action. In the case at bar, a district court judge in the Central District of California who was unfamiliar with the civil suits in the Arizona federal courts was required to examine two different, expansive antitrust complaints. (A 129-167) In one, *Petrol Stops Northwest v. Continental Oil Company,* Civ. No. 73-212 TUC-JAW (D. Ariz.), twelve corporate defendants including Douglas and Phillips were generally charged by Petrol Stops Northwest with 68 Sherman Act violations in 31 paragraphs ranging from a conspiracy to limit the supply of crude oil in the United States (A. 141) to the imposition of retail price schedules on "independent businessmen". (A. 144) In the other, *Gas-A-Tron of Arizona v. Union Oil Company of California,* Civ. No. 73-191 TUC-WCF (D. Ariz.) 28 Sherman Act violations together with Robinson-Patman violations were alleged to have been perpetrated by nine oil companies, including Phillips, but not Douglas. (A. 148-167) Because of the length and breadth of complaints such as these, a district court is normally required, if it is to acquire even a preliminary knowledge of the allegations, to expend considerable time examining and analyzing the many allegations continued therein.

More than the mere examination of a complaint is required, however, for a court to gain an understanding of the subject matter of a lawsuit in order for it to be able to decide the preliminary issue of relevancy. For example, only those matters complained of which can, as a matter of law, provide plaintiff with a basis for recovery should be considered in determining issues of particularized need. Precisely which allegations contained within a complex antitrust complaint provide a plaintiff with a basis of recovery is a question that often can be answered only when the court acquires con-

siderable knowledge of the business practices of the parties involved. A court may not be able to determine whether a plaintiff has standing to sue a defendant under a particular allegation unless and until it knows facts not contained in the complaint.[19] *E.g.*, a court may not be able to determine whether any of the allegations in the complaint involves the presence of intervening purchasers that would bar any recovery by this plaintiff unless and until it knows facts not contained in the complaint. *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977). A court, therefore, may not know whether material is relevant to a pending action unless and until it is intimately familiar with all the allegations, the broader legal issues and the underlying facts involved in the action.

In a protracted antitrust case, only the court responsible for that litigation can reasonably be expected to educate itself sufficiently as to the complex legal and factual issues in order to determine which items are relevant to the subject matter of the pending action. That court has all the information, or at least the incentive and wherewithal to acquire all the information, necessary to determine the relevancy issue. The incentive exists because that court, in the exercise of its judicial function, cannot avoid eventually examining and deciding these very issues. Indeed, the "bible" for complex actions, *Manual for Complex Litigation*, warns the trial judge

[19] For example, facts will be required to determine whether the anti-competitive effects of the alleged violation caused his injury. *E.g., Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); *GAF Corp. v. Circle Floor Co., Inc.*, 463 F.2d 752, 758-59 (2d Cir. 1972), *cert. denied*, 413 U.S. 901 (1973); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); or whether plaintiff was engaged in activities in the particular area of the competitive economy at which the alleged restraint was aimed. *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477 (1977); *Reibert v. Atlantic Richfield Co., supra., Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc.*, 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

that the experience of decades demonstrates the need for him to take immediate control of the litigation.[20] For example, he is instructed not to permit broad merits discovery until discovery has taken place on certain threshold issues such as class action, fraudulent concealment and, *a fortiori*, standing to sue or "injury".[21] In this case it is clear from the remarks of the district judge below that he did not carefully examine the subject matter of the civil litigation and compare it to the matters covered in the grand jury investigation.

The importance of having the court in which the civil suit is pending decide issues of relevancy is underscored by a number of recent studies, all of which are concerned with abuses of discovery.[22] This includes the currently suggested revisions to Rule 26(b)(1), Federal Rules of Civil Procedure. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has suggested that the permissible scope of discovery be changed so that discovery will be permitted only regarding "any matter not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party" rather than upon "any matter not privileged, which is relevant to the subject matter involved in the pending action."[23] This revision is intended to limit the sweeping

[20] Section 1.10 of the *Manual for Complex Litigation* (3d ed. 1977).

[21] Section 0.60 of the *Manual for Complex Litigation* (3d ed. 1977).

[22] *See e.g., Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation, American Bar Association* (October 1977, Second Printing and Revision December 1977).

[23] *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States,* March 1978, Proposed Advisory Committee Note to Rule 26, reported in 77 F.R.D. 613, 627 (1978).

and potentially abusive discovery permitted under the present rule,[24] and the new rule would necessarily require that the factual and legal issues first be substantially developed. Only a court charged with the administration of a civil suit can be expected to work through the competing assertions of counsel and identify those many issues.

Judicial economy is best served if the court in which the civil suit is pending determines whether a particularized need for disclosure of grand jury material exists in a particular case. No useful purpose is served where a second court expends judicial resources to rule on issues better determined in another court that must ultimately consider those same issues anyway. *Cf., Gibson v. United States,* 403 F.2d 166, 167 (D.C. Cir. 1968). In addition, the undesirable effect of a foreign district court's ruling can extend well beyond the mere waste and duplication of effort. That ruling can actually impede the judge whose judicial task it is to oversee and manage the trial of a complex antitrust action. Very often the effective management of such a case requires, not only that the judge decide the matters upon which discovery is to be permitted, but that the judge determine the *order* in which factual and legal issues are to be developed. A strong, informed judge who takes early control of a complex case can direct pretrial proceedings in a manner which will most efficiently forward the disposition of the case.[25] Rulings by a foreign court may

[24] *Id.*

[25] The need for strong judicial control of the complex case has itself formed the basis of the Federal Judicial Center's *Manual for Complex Litigation,* which suggests that a complex case be assigned to a single judge "to provide for uninterrupted judicial supervision and careful, consistent planning and conduct of pretrial and trial proceedings." *Manual for Complex Litigation,* § 0.30 (3d ed. 1977). It further suggests that discovery be discretely permitted in stages, *Id.* § 0.50, as it is crucial that the judge "provide an early and efficient schedule of pretrial discovery and preparation." *Id.* § 1.10.

well require the judge overseeing the case to depart from a carefully chosen, desirable course for the pretrial proceedings.

One final reason requires that the judge presiding over the civil action determine whether "particularized need" exists. A procedural rule which permits some other court to make the particularized need determination signals to a civil litigant that he may substitute the judgment of a foreign court for that of the presiding judge concerning an important pretrial issue. In this case, for example, Petrol Stops filed a request in the trial court for production of the grand jury materials. This was objected to by the defendants. Instead of seeking an order from the Arizona court under Rule 37 of the Federal Rules of Civil Procedure compelling production of the transcripts, Petrol Stops chose to petition the California District Court. Where a civil litigant can choose between courts (and thereby judges) to decide such issues, litigants can avoid a determination by a court more familiar with the lawsuit.[26] This opportunity permits the resourceful litigant much more than "forum shopping"; if the foreign court fails to order the government to produce such transcripts the civil litigant can simply return to the court where the civil action is pending and get a second opportunity to argue the same questions.

[26] The opportunity for forum shopping in such a situation is particularly invidious as litigants seeking disclosure are often able, not only to choose the court who will decide the issue, but to choose the *judge* who will determine the matter. A petition for production of grand jury materials is normally assigned to a miscellaneous docket to be heard by the duty judge. The civil litigants can determine whether they would rather have the duty judge or the judge having jurisdiction of the civil action hear the petition.

B. The Question Of Whether Any Reasons Remain For Protecting The Secrecy Of The Grand Jury Proceedings Can Be Gauged At Least As Well By The Court In Which The Civil Suit Is Pending As By A Judge In The District In Which The Grand Jury Proceedings Were Held

This brief has previously discussed the reasons for continued secrecy with respect to grand jury materials after the termination of criminal proceedings. The court in which the civil suit is pending is well equipped to evaluate these reasons. Where lower courts properly apply *Procter & Gamble* and disclose only those portions of the grand jury transcripts necessary to satisfy a particularized need, the problems of protecting the innocent accused and the free deliberations of grand jurors are minimized.

The remaining reason for secrecy, that of encouraging free and untrammeled disclosure of information in future grand jury proceedings, involves general issues of policy rather than particular facts. No one district court is better equipped than another to weigh that concern. To the extent facts are needed to determine whether disclosure would affect the flow of information in the future, those facts would include (1) the matters contained in the particular grand jury transcript sought; (2) knowledge of the witness, his position and activities, and (3) a general familiarity with the industry in which a witness works.[27] The court in which the grand jury sat has no greater familiarity with these facts (and probably less) than the court handling the civil action. Indeed, a judge

[27] Knowledge of the content of a transcript might indicate to what extent a particular witness would be adversely affected by disclosure. Knowledge of his activities and the industry in which he works could suggest the extent of the "chilling impact" on the future flow of information to the grand jury, depending upon the visibility of the adverse effects of disclosure upon the witness.

in the district where the grand jury proceedings were held may have no knowledge whatsoever of the grand jury or of the criminal proceedings.[28] Such was the situation in this case.

C. The District Court Below Should Have Denied Petrol Stops' Petition And Referred The Matter To The Court In Which The Civil Suit Is Pending Since That Court Was Fully Competent To Order Disclosure Of Grand Jury Transcripts In The Possession Of Parties To That Litigation

Plaintiffs sought disclosure of certain grand jury transcripts. Copies of all these transcripts were in the possession of Douglas and Phillips. The Arizona court has the power to order disclosure to the civil plaintiffs of the grand jury transcripts in the possession of Douglas and Phillips. There is no language in Rule 6(e), Federal Rules of Criminal Procedure, or in Rule 34, Federal Rules of Civil Procedure, prohibiting a court other than the one in which the grand jury sat from ordering disclosure of grand jury materials from parties within its jurisdiction.[29] To the contrary, the language of Rule 34 supports this view. There is no indication in *any* of the advisory notes of the Judicial Conference to either Rule 6(e) of

[28] Where an indictment is returned by a grand jury and a *nolo contendere* plea is accepted, no judge of that court would likely have had occasion to read and know the contents of the grand jury transcripts. After a United States attorney receives authorization to conduct a grand jury investigation, the knowledge of a judge "supervising" the grand jury is limited to an explanation of the general nature of the contemplated investigation by the prosecuting attorney. The judge would normally have no familiarity with testimony contained within grand jury transcripts. *See, Antitrust Grand Jury Practice Manual* at 9, 16, 23 (1975).

[29] This presumes that the materials sought are in the possession of a party under the jurisdiction of the court. *E.g.*, it is not argued that the Arizona court had the power to order the government, in a foreign jurisdiction, to produce its copies of the transcripts.

the Federal Rules of Criminal Procedure or Rule 34 of the Federal Rules of Civil Procedure that grand jury materials may only be disclosed by the court in which the grand jury was empanelled. Similarly, no legislative intent that a contrary rule was contemplated may be inferred from any statute modifying or amending either Rule 6(e) or Rule 34.[30] Moreover, the policy reasons discussed in previous sections of this brief wholly support the view that the civil litigation court rather than the grand jury court is generally better able to determine whether a compelling need exists and, therefore, ought to be the court to order disclosure of grand jury materials when copies are in the possession of parties to that litigation. The only "support" for the proposition that in all cases only the grand jury court is competent to order disclosure of grand jury materials is found in one case which fails to provide a persuasive rationale for that position.[31] More importantly, most of the courts which have considered the related issue have recognized the propriety of having the court familiar with the case for which disclosure is

[30] The legislative history on the Congressional modification of Rule 6(e); *i.e.*, Pub. L. No. 95-78, § 2(a), 91 Stat. 319 (1977), and the cases referred to therein, dealt with disclosure by the government's attorneys to other government employees or agencies to assist in the investigation. S. Rep. No. 354, 95th Cong., 1st Sess. 5-8 *reprinted in* [1977] U.S. Code Cong. & Ad. News 527, 529-532. The proper court to rule upon a disclosure during the course of the grand jury's proceedings would be that court in which the grand jury sat. It does not follow that that court is necessarily the proper one once the proceedings have concluded.

[31] *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 21 F.R.D. 233 (D.D.C. 1957); *see also Petrol Stops Northwest v. United States*, 571 F.2d 1127, 1130 n. 4 (9th Cir. 1978) (dicta); *State of Illinois v. Sarbaugh*, 552 F.2d 768, 772-773 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co. v. Illinois*, 434 U.S. 889 (1977) (dicta); *In re Grand Jury Investigation of Banana Industry*, 214 F. Supp. 856 (D. Md. 1963) (dicta).

sought determine particularized need.[32] This Court has never addressed these issues.

Rule 6(e), Federal Rules of Criminal Procedure, in pertinent part provides that matters occurring before the grand jury may be disclosed by an individual "only where so directed by the court preliminarily to or in connection with a judicial proceeding." None of the notes of the Advisory Committee to the Judicial Conference shed any light on the intended meaning of "the court" in the rule. On April 26, 1976 by order of this Court Rule 6(e) was amended[33] to provide in relevant part:

> (c) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding.

The revision changed the phrase "by the court" to "by a court". That change was unaccompanied by any explanation or rationale. No advisory notes on the change exist and no legislative intent may be gleaned from any of the Congressional hearings. It apparently was a change without an intended difference. From the language of the rule alone, it remains unclear which court or courts are referred to in Rule 6(e) as those competent to order disclosure of grand jury materials in connection with a judicial proceeding.

Procedural rules that must be read *in pari materia* with Rule 6(e) support the view that courts other than

[32] *See e.g., State of Illinois v. Sarbaugh*, 552 F.2d 768, 773, n. 5 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co. v. Illinois*, 434 U.S. 889 (1977); *Baker v. United States Steel Corp.*, 492 F.2d 1074, 1076 (2nd Cir. 1974); *Gibson v. United States*, 403 F.2d 166 (D.C. Cir. 1968); *City of Philadelphia v. Westinghouse Electric Corp.* 210 F. Supp. 486 (E.D. Pa. 1962).

[33] Pub. L. No. 95-78, § 2(a), 91 Stat. 319 (1977), modified the Supreme Court amendment. Under section 4(b) of the act the amendment became effective October 1 1977, 91 Stat. 322.

the one having jurisdiction over the grand jury have the power to order disclosure of grand jury materials in the possession of individuals in their jurisdiction. Rule 34 of the Federal Rules of Civil Procedure provides in pertinent part that a party may serve a request on another party to produce for inspection and copying "any designated documents . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served. . . ." The scope of discovery under Rule 26(b) of the Federal Rules of Civil Procedure extends "to any matter not privileged, which is relevant to the subject matter of the pending action." Grand jury materials are not absolutely privileged nor necessarily beyond the scope of the subject matter of a pending action. Disclosure of grand jury materials may be permitted under Rule 34, but only where a compelling necessity for the materials sought is demonstrated by the civil litigant. *United States v. Procter & Gamble Co., supra; State of Texas v. United States Steel Corp.*, 546 F.2d 626 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977); *United States v. Scott Paper Co.*, 254 F. Supp. 759 (W.D. Mich., 1966); *Hancock Bros., Inc. v. Jones*, 293 F. Supp. 1229 (N.D. Cal. 1968). Indeed, Petrol Stops initially moved in these cases to obtain transcript copies by means of a request pursuant to Rule 34 directed to Douglas and Phillips. The broader construction of the phrase "the court" in Rule 6(e) promotes to the fullest extent the policies contained in both the Rules of Civil and Criminal Procedure:[34] grand jury secrecy is accorded stringent

---

[34] A rule that the court with jurisdiction over the grand jury is the only court that can order disclosure of grand jury materials could have several anomalous effects. For example, that rule would be particularly unfortunate where the government, for whatever reason, no longer had copies of the grand jury transcripts and a civil litigant had the only existing copies but was outside the jurisdiction of the court in which the grand jury sat.

protection while civil litigants are permitted the broadest possible discovery in pursuit of their claims.

The one district court which has specifically ruled on the meaning of "the court" in Rule 6(e) has held that only the court having jurisdiction of the grand jury may order disclosure of those materials.[35] That court, in so ruling, provided no compelling rationale for its decision.[36]

---

[35] *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 21 F.R.D. 233 (D.D.C. 1957).

[36] In *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 21 F.R.D. 233 (D.D.C. 1957), a defendant in a civil action brought in another district court sought the production of grand jury minutes in the custody of the Attorney General in the District of Columbia. The grand jury proceedings had been held in the District Court of Massachusetts. The District of Columbia court held that it did not have jurisdiction under Rule 6(e) and stated that the seeking party should apply to the Massachusetts court.

The *Schwabe* case is distinguishable from the case at bar in so far as the District of Columbia court did not have jurisdiction over either the grand jury or the civil action. The *Schwabe* court examined Rule 6(e) Federal Rules of Criminal Procedure, noting that the rule forbids disclosure of matters occurring before the grand jury unless "solicited by the Court or permitted by the Court." *Id.* at 234. It then concluded that "the court" as used in Rule 6(e) was limited to the court having jurisdiction of the grand jury. The reasoning offered was largely conclusory:

> Obviously, the Court that has jurisdiction over the grand jury is in a better position to determine whether there should be a disclosure of the grand jury minutes than any other Court. It might lead to conflicts and possibly to chaos if any one of the ninety or more United States District Courts could direct the disclosure of the minutes of a grand jury sitting in any other District. *Id.* at 235.

Respectfully differing with that district court judge, it is not obvious at all that the grand jury court is best able to determine the propriety of disclosure. Quite the contrary, it is the court with jurisdiction of the judicial proceeding for which the materials are sought that is best able to provide that guidance. When one systematically works through all the constituent is-

However, other courts which have considered the related issue have noted the prudence of having the court handling the civil proceeding determine issues of particularized need. The United States Court of Appeals for the District of Columbia Circuit recognized that only the court responsible for the judicial proceeding for which grand jury materials are sought is competent to determine whether a compelling necessity for disclosure actually exists. In *Gibson v. United States,* 403 F.2d 166 (D.C. Cir. 1968), the appellant was arrested on charges of assault. A grand jury, when presented with the case, returned a no true bill. Thereafter the United States attorney initiated prosecution in the court of general sessions charging the appellant with assault. The appellant then filed a motion in the district court for the production of the grand jury testimony of the complainant and other witnesses. The district court refused to grant access on the alternative grounds that the appellant had not shown the requisite need and that disclosure would be inappropriate in the absence of a preliminary finding by the court of general sessions that disclosure of grand jury testimony was warranted.

---

sues, as has been done in this brief, it is obvious that that court is best capable of the task.

The *Schwabe* court's concern that a rule permitting courts other than the grand jury court to order production of grand jury materials would lead to conflicts and chaos is wholly unfounded. Because a court has the power to rule on a matter does not dictate that the court do so where the reasonable exercise of discretion requires that the court do otherwise. Unapprised of the reasons disclosure was sought, the District of Columbia court rightly referred the matter to the court with knowledge of those matters. That action was proper whether or not the District of Columbia had the power to rule on the motion before it. The better rule is that the District of Columbia Court had the power to rule on the motion, but the proper exercise of discretion required that it refer the question to a court informed about the subject matter. Failure to follow this rule might itself lead to chaos.

In affirming the order of the district court, the circuit court recognized the wisdom of having the informed court decide the issue.

While agreeing that the District Court could order production under Rule 6(e), however, the Government argues that the District Court established a sound administrative procedure for cases of this sort by refusing to grant access to the grand jury testimony without a request or certification by the Court of General Sessions that production would be warranted. The procedure suggested by the Government is attractive. If the defendant prosecuted in the Court of General Sessions first requested that court to make such a certification, the District Court could rely upon a finding by the court where the case was pending; it would not face the need itself to examine the circumstances of a case in which it was not otherwise involved. A refusal by the Court of General Sessions to certify that production would be appropriate could be reviewed by the District of Columbia Court of Appeals after conclusion of the trial as part of an appeal from conviction; piecemeal appellate review would thereby be avoided. *Id.* at 167-168.

The Seventh Circuit Court of Appeals in *State of Illinois v. Sarbaugh,* 552 F.2d 768 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co. v. Illinois,* 434 U.S. 889 (1977), stated in dicta that "the reference [in Rule 6(e) to the court] must be to the court of the district in which the grand jury was convened", 552 F.2d at 772-773, without offering any supporting reasons for that conclusion except "[i]t is that court that has the responsibility for enforcing Rule 6(e) and maintaining the secrecy of the grand jury procedings." 552 F.2d at 773. However, even the Seventh Circuit favorably viewed the procedure

taken by the lower court in that case which did permit the court hearing the civil case to rule on particularized need.

> We do not imply disapproval of the procedure adopted by the District Court in this case of transferring the transcripts to the district in which the trial was to be held, so that court can make determinations of particularized need during trial, which the transferor court is not in a position to do. In a case in which the secrecy of the transcripts had not already been partially breached . . . and there is a likelihood that a particularized need will arise during trial, that procedure would be eminently sensible and, we believe, within the power of the court of the district in which the grand jury is convened. Cf. *Baker v. United States Steel Corp.*, 492 F.2d 1074, 1076-1077, 1078 (2d Cir. 1974); *Gibson v. United States*, 131 U.S. App.D.C. 143, 403 F.2d 166, 167-168 (1968). *Id.* at 773 n. 5.

The court in which the judicial proceeding is pending is consistently recognized by most courts as the court best able to determine whether disclosure of grand jury materials is proper. Yet a few courts still incur substantial hardship and expense by mechanically observing what they believe to be a procedural rule for which there is neither compelling rationale nor legislative support. A construction of Rule 6(e) which permits the court having jurisdiction of the judicial proceeding for which grand jury materials are sought to order disclosure of those materials from a party within its jurisdiction is eminently prudent and reasonable.

D. The District Court Below Should Have Denied Petrol Stops' Petition Or Alternatively Merely Have Ordered The Transfer Of The Transcripts To The Court In Which The Civil Suit Is Pending

The district court below had available a number of procedures which would have properly placed before the

civil action court the compelling necessity issue. The district court abused its discretion by not adopting one of the following procedures: certifying the question of need to the civil court, ordering production of the transcripts to that court so it could determine whether a particularized need for disclosure existed, or refusing to grant the petition to produce and sending Petrol Stops back to the Arizona court for that court's decision on the issue. As outlined above, the majority of the courts have commended just such procedures.[37]

A model procedure was that employed by Chief Judge Clary of the United States District Court for the Eastern District of Pennsylvania. In *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 486 (E.D. Pa. 1962), Judge Clary was asked by a civil litigant to order the production of the grand jury transcript of a particular witness. The grand jury had been held in the district court over which the judge presided. The civil action out of which the request for the specific transcript arose was also before Judge Clary. The civil action, however, was one of 1800 civil antitrust actions brought against manufacturers of heavy electrical equipment by customers alleging damages arising out of the same circumstances that had previously resulted in criminal judgments against the same defendants in Judge Clary's court. Judge Clary himself ruled on the request from the civil litigant whose case was before him. But, recognizing that litigants in other district courts with cases pending which alleged the same subject matter would also ultimately seek the grand jury materials over which he had jurisdiction, the judge proposed to make the transcripts available to other trial judges in order that they could make the particularized need determination which they alone were competent to do. Judge Clary stated:

> If, at the completion of any deposition taken in the national program, a motion is made for the production

[37] *See* note 32, *supra*.

of that witness's grand jury testimony, and if the deposition judge requests it from this court for examination in camera, the testimony will be immediately made available to him. The deposition judge may then contrast the grand jury testimony with the deposition and determine, in his own discretion, whether in the interests of justice, there is compelling need for disclosure.

Not all situations that may confront a deposition judge can be foretold or foreseen, but some workable program in this connection must be devised which will insure the production of grand jury testimony under proper safeguards. *Id.* at 491.

See Atlantic City Electrical Co. v. General Electric Co., 244 F. Supp. 707 (S.D.N.Y. 1965) and *Consolidated Edison Co. of New York v. Allis-Chalmers Manufacturing Co.*, 217 F. Supp. 36 (S.D.N.Y. 1963) for the application of this ruling by other trial judges. The court recognized that it did not have the information necessary to make the determination of whether a party seeking grand jury transcripts had sufficiently demonstrated a particularized need. Where a judge cannot make that determination, the proper exercise of judicial discretion to insure the safeguards of the grand jury system require that he defer such a judgment to another judge who can. This procedure should have been, but was not, followed by the district judge below.

CONCLUSION

The judgment of the district court should be reversed. An order should be entered rendering judgment for petitioners on the following grounds: (1) that the district court below abused its discretion by ordering disclosure of entire grand jury transcripts without a showing of compelling necessity; and (2) that the district court abused its discretion by not adopting an available pro-

cedure which would have permitted the Arizona court to participate in the determination of compelling necessity.

DATED: August 23, 1978

Respectfully submitted,

LATHAM & WATKINS
MAX L. GILLAM
MORRIS A. THURSTON
GEORGE H. W[illegible]
555 South Flower Street
Los Angeles, California
90071
(213) 485-1234

EVANS, KITCHEL & JENCKES, P.C.
HAROLD J. BLISS, JR.
363 North First Avenue
Phoenix, Arizona 85003
(602) 262-8863

RODERICK G. DORMAN
THOMAS H. BURTON, JR.
Post Office Box 2197
Houston, Texas 77001
(713) 965-2532

Attorneys for Petitioner
Douglas Oil Company
of California

Attorneys for Petitioner
Phillips Petroleum
Company